Supreme Court, U.S.
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No. 94-1392

In the Supreme Court of the United States

OCTOBER TERM, 1994

THOMAS E. HAUERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury on the element of willfulness and on petitioner's good-faith defense.

2. Whether the district court abused its discretion when it excluded opinion testimony of lay witnesses about the sincerity of petitioner's claimed belief that he was not liable for taxes.

3. Whether the court of appeals correctly found that remarks by the prosecutor during rebuttal summation did not constitute reversible error.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1a-15a, is reported at 40 F.3d 197.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1994. The petition for a writ of certiorari was filed on February 13, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on four counts of willfully evading income taxes, in violation of 26 U.S.C. 7201, and four counts of willfully failing to file income tax returns, in violation of 26 U.S.C. 7203. He was sentenced to 12 months' imprisonment, to be followed by three years' supervised release, and was fined $2,000. Pet. C.A. Br. App. The court of appeals affirmed. Pet. App. 1a-15a.

1. From 1966 through 1992, petitioner was employed by Caterpillar, Inc., during which time he earned wages. Until 1980, petitioner filed income tax returns and listed the wages he earned from Caterpillar as taxable income. Tr. 292, 300. For tax years 1980 and 1981, he filed income tax returns on which he failed to list his wages from Caterpillar as taxable income. Tr. 300. Thereafter, he ceased filing returns. Tr. 242. Also, on his Forms W-4 for tax years 1988 through 1991, petitioner claimed a large number of withholding allowances or claimed to be exempt from federal income tax withholding. Gov't C.A. Br. 7. During those tax years, petitioner was not entitled to the number of allowances he claimed, nor was he exempt from federal withholding requirements. *Ibid.*

The Internal Revenue Service (IRS) audited petitioner for tax years 1980 and 1981. Petitioner and his wife filed a petition in the United States Tax Court to challenge the outcome of the audit. In that petition, petitioner did not contest the IRS's determination that his wages were income. The Tax Court case was eventually settled. Gov't C.A. Br. 9-10.

2. Petitioner was prosecuted for willfully evading taxes and for willfully failing to file tax returns for 1988 through 1991. Petitioner testified at trial that he first developed a belief that wages are not income between the fall of 1980 and March 1981, after a co-worker at Caterpillar, Gabe Thompson, advised him that wages are not income, and that petitioner did not have to file tax returns or pay taxes on his wages. Petitioner testified that he read various tax protestor books, attended tax protestor seminars, and did his own legal research, all of which, he claimed, solidified his belief that wages are not income. Gov't C.A. Br. 11-12.

Petitioner admitted that he knew that Form 1040 advises taxpayers that wages are taxable income, and also that the IRS notified him that he should have included his wages as income on tax returns. He also admitted that a certified public accountant (CPA) had told him that he would be "on thin ice" if he claimed in the Tax Court litigation that wages are not income, because such a position was frivolous, and that the advice had led him not to assert the argument that wages are not income in the case. He further admitted that, by 1986, he had consulted with several lawyers, CPAs, and tax preparers, all of whom informed him that he was required to file tax returns and to pay taxes. He claimed, however, that he chose to rely in good faith on the advice of his co-worker Gabe Thompson, who was neither an attorney nor a CPA. Gov't C.A. Br. 12-13.

Petitioner called as witnesses five acquaintances, who testified that he had a good reputation for truthfulness. Petitioner also sought to ask those witnesses whether they had an opinion as to whether he had a good-faith belief in his positions on the tax laws, but

the district court precluded that testimony under Federal Rules of Evidence 701 and 704. Noting that Rule 704(b) precludes experts from testifying in criminal cases as to the ultimate issue of a defendant's mental state, the court reasoned, "by extension," that "opinion testimony is simply not available on this topic, * * * whether or not [petitioner] is sincere in the beliefs that may have caused him to mistake his obligation under the Internal Revenue Code." Tr. 124-125.

During the government's closing argument, the prosecutor stated that petitioner "is the individual who must convince you that he has a good faith belief. If you think he has a good faith belief, then you are right, he is home free, he walks out of here, he doesn't pay his taxes for ten years, he is completely vindicated." Tr. 552. The district court immediately sustained petitioner's objection to that argument. *Ibid.*

At the end of trial, the district court instructed the jury on the element of willfulness as follows (Tr. 564):

> When the words "willful," "willfulness," or "willfully" are used in these instructions, they mean the voluntary and intentional violation of a known legal duty or the purposeful omission to do what the law requires. In other words, they mean that [petitioner] knew he was required by law to file an income tax return, or to file a return and pay tax and failed to do so, with the purpose either to disobey or disregard the tax laws.
>
> A failure to act is willfully done if done voluntarily, and intentionally, as distinguished from a failure to act as a result of ignorance or a mistake.

The district court also instructed the jury on petitioner's good-faith defense (Tr. 564-565):

> If [petitioner], in good faith, believed the tax laws did not require that he file individual income tax returns for a particular year, then any failure to file an individual income tax return for that year cannot be found to be wiliful, even if such belief was incorrect. Similarly, if [petitioner], in good faith, believed that under the tax laws he did not have any income tax obligation for a particular year, then any failure to pay income taxes for that year cannot be found to be willful, even if such belief was incorrect.
>
> However, a disagreement with the tax laws or a personal belief that the tax laws are unconstitutional, no matter how earnestly believed, will not negate willfulness. It is the duty of all citizens to obey the law whether they agree with it or not.

3. The court of appeals affirmed. Pet. App. 1a-15a. On the issue of the instructions on willfulness and good-faith belief, the court rejected petitioner's argument that the district court was required to instruct the jury specifically that good faith was a matter of petitioner's "subjectiv[e] belie[f]." *Id.* at 10a-11a. The court also concluded that the instructions given were consistent with *Cheek* v. *United States*, 498 U.S. 192 (1991). See Pet. App. 10a.

The court of appeals also upheld the district court's exclusion of the proffered lay opinion testimony about the sincerity of petitioner's claimed beliefs about the application of the tax laws. Pet. App. 5a-8a. The court observed that, to be admissible under Federal

Rule of Evidence 701, lay opinion testimony must be "helpful to a clear understanding of * * * the determination of a fact in issue." See Pet. App. 6a. The court noted that lay opinion testimony on a party's knowledge of the law usually will not satisfy Rule 701, *id.* at 7a, and it reasoned that, because of the nature of this case, petitioner's beliefs about the propriety of not filing returns were "closely related to [his] knowledge about tax laws," *id.* at 8a. It thus concluded that the lay opinion testimony proffered by petitioner would not have been helpful to the jury in obtaining a clear understanding about whether petitioner held a good-faith belief about the application of the tax laws. *Ibid.*

The court of appeals further held that the prosecutor's statement, during rebuttal summation, about petitioner's need to persuade the jury of his good faith, was not reversible error. Although the court believed that the prosecutor's argument appeared to shift the burden incorrectly to petitioner to prove that he had a good-faith belief, the court concluded that the error was harmless because the district court sustained an immediate defense objection, and because the court instructed the jury that the burden of proof remained on the government throughout the proceedings. Pet. App. 14a.

ARGUMENT

1. Petitioner contends (Pet. 10-19) that the district court's instruction on good faith did not comply with *Cheek* v. *United States*, 498 U.S. 192 (1991), and that the court of appeals' decision upholding that instruction conflicts with a decision of the Second Circuit. Those arguments are without merit.

a. In *Cheek*, the Court concluded that the element of willfulness in criminal tax prosecutions requires the government to prove the "voluntary, intentional violation of a known legal duty." 498 U.S. at 201; see also *United States* v. *Pomponio*, 429 U.S. 10, 12-13 (1976) (per curiam). Under *Cheek*, it is error for a district court to instruct the jury that a defendant's claimed good-faith belief about the applicability of the tax laws must be objectively reasonable. 498 U.S. at 203. Contrary to petitioner's assertion (Pet. 16), however, *Cheek* did not also hold that a trial court must expressly instruct the jury that objective reasonableness is completely irrelevant to the question of willfulness.

In this case, the district court's "willfulness" instruction satisfied the requirements of *Cheek*. The court instructed that, "[w]hen the words 'willful,' 'willfulness,' or 'willfully' are used in these instructions, they mean the voluntary and intentional violation of a known legal duty or the purposeful omission to do what the law requires. In other words, they mean that [petitioner] knew he was required by law to file an income tax return, or to file a return and pay tax and failed to do so, with the purpose either to disobey or disregard the tax laws." Tr. 564. That instruction tracked the definition of "willfulness" set forth in *Cheek*.

In addition, even though no separate instruction on good faith is required (see *Cheek*, 498 U.S. at 201; *Pomponio*, 429 U.S. at 13), the district court instructed the jury as follows:

> If [petitioner], in good faith, believed the tax laws did not require that he file individual income tax returns for a particular year, then any failure

> to file an individual income tax return for that year cannot be found to be willful, even if such belief was incorrect. Similarly, if [petitioner], in good faith, believed that under the tax laws he did not have any income tax obligation for a particular year, then any failure to pay income taxes for that year cannot be found to be willful, even if such belief was incorrect.

Tr. 564. The good-faith instruction did not suggest that petitioner's claimed belief had to be objectively reasonable to negate willfulness, and therefore did not contravene *Cheek*.

b. Petitioner argues (Pet. 10, 15-19) that the decision below conflicts with *United States* v. *Pabisz*, 936 F.2d 80 (1991), in which, he asserts, the Second Circuit required that the district court expressly instruct the jury that it should consider only the defendant's subjective beliefs, and that those beliefs need not be objectively reasonable. In *Pabisz*, the district court had instructed the jury, before *Cheek*, that "[t]he issue for you is[,] was the defendant reasonable in having a good faith belief that the income tax law did not apply to him." *Id.* at 82. The Second Circuit stated that "[t]he basic problem with the instruction given is that, on the issue of good faith, the jury was not instructed that it must consider whether Pabisz subjectively believed that he did not need to file income tax returns or pay taxes. Put another way, the court did not instruct the jury that defendant's beliefs need not be objectively reasonable if they were actually held in good faith." *Id.* at 83 (citations omitted).

The Second Circuit revisited the issue of proper instructions on good faith in *United States* v. *Droge*,

961 F.2d 1030, cert. denied, 113 S. Ct. 609 (1992). In *Droge*, the district court told the jury that it should acquit the defendant "if you find that he sincerely and in good faith believed that the law was that he did not have to file a return." *Id.* at 1038. The court of appeals observed that the instruction did not "explicitly eschew an 'objective' standard or expressly state that the jury had to employ a 'subjective' standard in measuring the veracity of [the defendant's] asserted beliefs." *Ibid.* The court of appeals nonetheless reasoned that the case was "quite unlike *Cheek* or *Pabisz*" because of the good-faith instruction that was given, and it concluded that the instruction's "emphasis on [the defendant's] personal sincerity and good faith in those beliefs, and whether they were honestly held by [the defendant], adequately communicated the subjective approach that the jury was required to take." *Ibid.*

Like the instruction in *Droge*, the willfulness instruction given by the district court in this case focused on petitioner's state of mind, and it did not suggest that an erroneous belief actually held in good faith had to be objectively reasonable to negate willfulness. There is no reason to believe that the Second Circuit would reach a different result on the facts of this case.

c. Petitioner also contends (Pet. 18-19) that the district court erred in instructing the jury that "a disagreement with the tax laws or a personal belief that the tax laws are unconstitutional, no matter how earnestly believed, will not negate willfulness. It is the duty of all citizens to obey the law whether they agree with it or not." Tr. 564-565. Petitioner argues that the instruction was improper because there was no evidentiary basis for a finding that his refusal to

pay taxes was motivated by mere disagreement with the tax laws.* The district court concluded, however, that the instruction was warranted because "the evidence does support at least an argument on the part of the government that [petitioner's] real motive arises out of a disagreement with the tax laws." Tr. 470.

The district court's conclusion was proper. Petitioner testified that he first arrived at the belief that wages are not income after a discussion with a coworker. Petitioner stated that he continued to hold that belief in good faith, notwithstanding advice from attorneys, CPAs, and IRS agents that wages must be included as income. Based on that testimony, the government could properly argue, and the jury could reasonably conclude, that petitioner's alleged belief that wages are not income amounted to nothing more than a disagreement with the law. As the Court noted in *Cheek*, "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws." 498 U.S. at 203-204.

2. Petitioner contends (Pet. 19-24) that the district court erred in refusing to allow five defense witnesses to give opinion testimony that he sincerely held his claimed belief that he was not liable for taxes. See Pet. 20 (petitioner sought to introduce testimony that, "in the opinion of these witnesses," his beliefs

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* Petitioner cannot contend that the instruction misstated the law. In *Cheek*, 498 U.S. at 205-206, the Court held that mere disagreement with the tax laws does not negate willfulness.

were sincerely maintained). That contention is incorrect.

Under Federal Rule of Evidence 701, if a witness is not testifying as an expert, "the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." The admission of lay opinion testimony is committed to the sound discretion of the district court. *United States* v. *Burnette*, 698 F.2d 1038, 1051 (9th Cir.), cert. denied, 461 U.S. 936 (1983); see *Hamling* v. *United States*, 418 U.S. 87, 124-125 (1974). In this case, the district court properly exercised its discretion under Rule 701, because the excluded testimony would not have been helpful to the jury.

The theory behind Rule 701 "is that wherever inference[s] and conclusions can be drawn by the jury as well as by the witness, the witness['] [opinion testimony] is superfluous." *United States* v. *Jackson*, 688 F.2d 1121, 1124 (7th Cir.) (emphasis omitted), cert. denied, 460 U.S. 1043 (1983). The lay opinion testimony proffered by petitioner would have added little to the jury's understanding of the case. The best evidence from which the jury could determine whether petitioner held his asserted beliefs in good faith was petitioner's own factual testimony about those beliefs and how he arrived at them, and petitioner testified at length about those subjects.

Moreover, as the court of appeals correctly observed (Pet. App. 7a-8a), petitioner's acquaintances were not well positioned to give an informed opinion about the sincerity of petitioner's beliefs, because that opinion would have required them to be familiar

with petitioner's knowledge of the tax laws. There was no showing in this case that they had such familiarity. "When a witness has not identified the objective bases for his opinion, the proffered opinion obviously fails completely to meet the requirements of Rule 701." *United States* v. *Rea*, 958 F.2d 1206, 1216 (2d Cir. 1992).

3. Finally, petitioner contends (Pet. 24-26) that a statement by the prosecutor during closing argument impermissibly shifted the burden to petitioner to prove his good-faith defense, and incorrectly informed the jury that an acquittal would absolve petitioner of liability for his unpaid taxes. Petitioner notes that "[t]he Court of Appeals was satisfied that an objection to this argument was sustained" by the district court, but he asserts that "[t]he cure was inadequate." Pet. 26. That fact-bound contention was correctly rejected by the court of appeals and does not warrant further review.

Any error caused by the prosecutor's remark during closing argument was harmless, because the district court immediately sustained petitioner's objection and admonished the prosecutor to "[s]tay with the issues." Tr. 552. The district court also properly instructed the jury on the burden of proof (Tr. 559), as follows:

> [Petitioner] is presumed to be innocent of the charges. This presumption remains with [petitioner] throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that [petitioner] is guilty.

> The government has the burden of proving the guilt of [petitioner] beyond a reasonable doubt, and this burden remains on the government throughout the case. [Petitioner] is not required to prove his innocence or to produce any evidence.

That instruction clearly placed the burden of proving every element of the case, including willfulness, on the government. Moreover, the instruction informed the jury that petitioner was not required to prove his innocence or to produce any evidence in his defense. As the court of appeals held, the instruction was sufficient to dispel any prejudice that the prosecutor's statement might have caused. See *United States* v. *Stillwell*, 900 F.2d 1104, 1112 (7th Cir.) ("Defendants are entitled to a new trial only if the government's comments * * * prejudiced the defendants' rights to a fair trial."), cert. denied, 498 U.S. 838 (1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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